

IN THE SUPREME COURT OF THE STATE OF MONTANA

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case No. DA 09-0487

VALERIE EMMERSON,

Petitioner and Appellant,

v.

WALLACE C. WALKER and RANA RAE WALKER,

Respondents and Appellees.

.....
WALLACE C. WALKER and RANA RAE WALKER,

Third-Party Plaintiffs, Appellees, and Cross-Appellants

v.

S. TUCKER JOHNSON,

Third-Party Defendant and Appellant

.....
On appeal from:Montana Sixth Judicial District Court, Sweet Grass County
Hon. Wm. Nels Swandal, District Judge
Cause No. DV 2007-8

APPELLEE'S REPLY BRIEF
(re: Appellee's Cross-Appeal)

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INTRODUCTION

Johnson chastises Walkers for making improper personal attacks against Johnson in their opening brief (Johnson Reply Br., p. 1). He accuses Walkers of trying “to paint a picture of Johnson as a wealthy, aggressive and unsavory person who deserves to be punished....” (*Id.*, at 15). The extent to which that picture is accurate, however, is a function of Johnson’s conduct, not Walkers’ words.

Walkers make no apologies for their view that Johnson tried to use his wealth and power to bully them and wear them down. But their intent was and is to recite only those facts relevant to their claims, and that is what they have done. All instances of Johnson’s conduct and acts recited in Walkers’ prior brief are documented by reference to the record on appeal, and the vast majority of them are to be found in the district court’s findings and conclusions. Johnson’s acts, conduct, and statements are evidence of his motives and relevant to both the Walkers’ tortious interference claim and the district court’s assessment of emotional distress damages. His more egregious acts and conduct are relevant to the punitive damages issues that Walkers have brought on appeal.

Though Johnson would clearly prefer it, this case cannot be decided fairly in a factual vacuum.

ARGUMENT

I. JOHNSON CONTINUES TO WHITEWASH THE FACTS OF THIS CASE, IGNORING DISTRICT COURT FINDINGS AND CONCLUSIONS THAT AMPLY SUPPORT TORTIOUS INTERFERENCE LIABILITY AND AN AWARD OF COMPENSATORY AND PUNITIVE DAMAGES.

Johnson's arguments continue to be premised on a cherry-picked version of the facts found by the district court. He presents only a few facts in obvious efforts to limit the extent of his apparent involvement in the Walker/Emmerson exchange, even though the record on appeal reflects that he culpably insinuated himself into their exchange agreement up to his eyebrows. He continues to argue that Emmerson didn't breach the exchange agreement but rather that the district court merely enforced it, an argument that defies logic. For the reasons described below and in Walker's opening brief (pp. 21-24), Emmerson wrongfully breached the contract, and Johnson induced that breach by engaging in conduct that was intended to interfere with and ultimately break the exchange agreement for his benefit.

A. The district court's directed remedy of specific performance was predicated on Emmerson's wrongful breach of the Walker/Emmerson exchange agreement, a breach induced by Johnson.

Johnson continues to argue that he did not induce Emmerson's breach of the exchange agreement because there was no breach. (Johnson's Reply Br., pp. 4-7). Johnson makes much of the fact that Emmerson eventually performed the contract, arguing that because she performed she was not in

breach. This is wrong and flies in the face of basic principles of contract law and remedies. Emmerson only performed because the district court *ordered* her to do so. And, as discussed below, the court ordered that specific relief because Emmerson was in breach of the exchange agreement.

The fault with Johnson's argument is that he confuses a claim for relief with its remedy. Specific performance is not an independent cause of action brought to enforce a contract. Instead, it is a *remedy* aimed at redressing an underlying claim of contract breach. The district court granted specific performance *because* Emmerson was in breach of the exchange agreement, not in lieu of finding a breach as Johnson argues.

This Court has repeatedly characterized specific performance as a remedy: "Specific performance is an *equitable remedy* which empowers the court to fashion a *remedy* which is appropriate under the circumstances according to the purpose of the contract." *First Sec. Bank v. Vander Pas* (1991), 250 Mont. 148, 154, 818 P.2d 384, 387 (emphasis added). *See also, Seifert v. Seifert* (1977), 173 Mont. 501, 504, 568 P.2d 155, 156 ("Specific performance is an equitable remedy which compels the performance of a contract in the precise terms agreed on."). In *Majers v. Shining Mountains* (1988), 230 Mont. 373, 378, 750 P.2d, 449, 452, this Court stated:

Additionally, we must note that specific performance is an equitable remedy: "[T]he foundation of a suit for performance of a contract is that, by compelling the parties to do the very things they agreed to do, more complete and perfect justice is attained than by giving damages for breach of a contract. Specific performance is purely an equitable remedy; presenting a purely equitable controversy and is governed by equitable principles." 81 C.J.S. Specific Performance Section 1, p. 408.

As discussed in Walkers' initial brief, Emmerson was in breach of the exchange agreement both before and after she filed her lawsuit. (Walker Opening Brief, pp. 21-24) Initially, Emmerson repudiated the exchange agreement. In a February 23, 2007 letter from her attorney to Walkers, Emmerson stated in no uncertain terms her intent not to perform: "Be advised that by this letter that Val Emmerson *repudiates* the 'Exchange agreement' and considers it to be *null and void*." Walker Exh. J; Response Br. Appendix 4 (emphasis added). Emmerson's repudiation gave Walkers an immediate right to seek a remedy for breach of contract, *See Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶104, 345 Mont. 12, 192 P.3d 186, and that is precisely what they did. In their counterclaim to Emmerson's declaratory judgment action, Walkers specifically alleged Emmerson's repudiation, stating that "Emmerson has given notice that she will not comply with the terms of the Land Exchange Agreement." (CRR 6, p.5). Walkers did not, as Johnson argues (Johnson's Reply Br., p. 5), treat Emmerson's repudiation as an "empty threat" and fail to respond to it. Instead they filed their counterclaim, alleged the breach, and sought the remedy of specific performance.

Emmerson also breached the exchange agreement by refusing to set a closing date and exchange deeds within the prescribed time.¹ Johnson, citing *Lincoln Property Co. v. Travelers Indemnity Co.* (2006), 137 Cal. App.4th 905, argues that a party "obviously" cannot be held liable for a breach

¹ Emmerson had 60 days from the date of the State Land Board meeting to tender performance under the exchange agreement. (Walker Exh. D ¶3; Walker Opening Brief Appendix 1. That period elapsed during the litigation's pendency.

occurring while a declaratory judgment proceeding is underway. (Johnson Reply Br., p. 7). However, the only thing “obvious” about that point is that it is wrong. In *Lincoln Property* a California appeals court, discussing California’s primary right theory and principles of res judicata, stated that a party seeking specific performance and delay damages must do so in the same, initial proceeding. The court cited prior precedent stating that a party cannot obtain specific performance in one proceeding and then sue for delay damages in a second proceeding based on the same contract breach. *Id.* at 913. *Lincoln Property* has nothing to do with suspension of contract rights during a declaratory judgment proceeding and does not even remotely support Johnson’s argument.

The Walkers can find no authority in the Uniform Declaratory Judgment Act or this Court’s rulings supporting an argument that declaratory judgment proceedings suspend a party’s rights and remedies under a contract. While a declaratory judgment proceeding may be brought either before or after a party breaches a contract, Mont. Code Ann. §27-8-203, nothing in the Act alters the underlying contract’s terms or tolls the time for a party’s performance. The party who refuses to perform and instead files a declaratory judgment action attacking a contract’s validity must bear the risk that the action may not turn out in his or her favor and that he or she may incur liability for failing to perform contract obligations that become due during the pendency of the lawsuit.

The purpose of a remedy is to right a wrong. In its conclusions of law the district court made clear that its order of specific performance was intended to

remedy Emmerson's breach of the exchange agreement. The district court concluded:

Specific Performance of an obligation may be compelled when the act to be done is such that pecuniary compensation for its *nonperformance* would not afford adequate relief, §27-1-411 M.C.A. It is presumed that the *breach of an agreement to transfer real property* cannot be adequately relieved by penury [sic] compensation. §27-1-411 M.C.A. Specific Performance is an appropriate remedy in a real estate exchange agreement. Walkers are entitled to have Emmerson specifically perform by transferring her property to Walkers in exchange for the transfer of the Walker property to Emmerson.

(COL 9, p. 23, emphasis added). The district court fashioned a remedy to redress Emmerson's breach of the exchange agreement. There was no other reason to grant the remedy. If Emmerson had not been in breach of the exchange agreement—*i.e.* had she not repudiated the agreement and the time for her performance had not yet arrived—there would have been no grounds for granting a specific performance remedy. Absent a breach the district court would have merely declared the relative rights of the parties, holding the agreement valid and enforceable. It would not have compelled immediate specific performance if Emmerson was not in breach and her performance was not yet due.

In short, the district court did not order specific performance in lieu of finding a contract breach; it ordered Emmerson to perform because she was in breach of the exchange agreement. Emmerson's breach and failure to perform the exchange agreement were the reasons for the specific performance remedy.

The district court's findings and the record on appeal are replete with evidence that Johnson induced Emmerson's breach of the exchange agreement. The district court found that Emmerson repudiated the contract via a letter from Emmerson's and Johnson's lawyer. (FOF 47, p. 27). The district court also made several findings reflecting that Johnson engaged in a pattern of conduct over an extended period of time with intent to entice Emmerson to ignore the exchange agreement. (FOF 35-43, pp. 13-16). Johnson's conduct aimed at inducing Emmerson's breach is summarized (with references to the record on appeal) in Walkers' Opening Brief (pp. 18-20).

B. Johnson, as a stranger to the contract, had no fundamental litigation rights with respect to the Walker/Emmerson exchange agreement, and his non-privileged conduct easily supports the district court's conclusion that he tortiously interfered with the exchange agreement.

In his reply brief Johnson argues that the district court erred when it found that Johnson tortiously interfered with Walkers contract based on several acts, some of which acts Johnson claims were protected. Even though Johnson failed to raise his alleged litigation privilege at the district court level and this court should not consider it,² this argument fails on several other fronts.

² Johnson claims that his manufactured, "derivative" rights implicate constitutional issues and thus may reviewed for the first time on appeal. (Johnson Reply and Answer Br., pp. 2-3). He cites the "plain error" doctrine which allows an appellate court to take notice of plain errors affecting substantial rights not brought to the district court's attention. However, the doctrine is most often confined to criminal cases, where fundamental rights of life and liberty may be at stake. *See Reno v. Erickstien* (1984), 209 Mont. 36, 42, 679 P.2d 1204, 1207-08. The plain error doctrine is used in civil litigation

First, under the facts of this case Johnson has no protected litigation right. As a stranger to the contract Johnson had no litigation privilege. Johnson had no standing to litigate any issues arising under the exchange agreement between Walkers and Emmerson. (*See* Walkers' Opening Brief, Argument IV.A, pp. 24-26).

Second, Johnson is incorrect in representing that the district court relied upon only six acts for a finding of tortious interference. In fact when all of the district court's findings and conclusions are read together as a whole, it is clear the district court considered the ongoing and continuing attempts by Johnson to interfere with the Walker's contract. Those acts spanned several months and

only in exceptional cases. *See Zimmerman v. Bozeman Products Assoc.* (1988), 233 Mont. 156, 160, 759 P.2d 166, 169. Exceptional cases are those raising constitutional issues that involve broad public concerns where addressing a point of law may avoid future litigation. *See Cottrill v. Cottrill Sodding Service* (1987) 229 Mont. 40, 41, 744 P.2d 895, 896. This Court has often refused to review claimed violations of constitutional rights raised for the first time on appeal. *See, e.g., State v LaFreniere*, 2008 MT 99, 342 Mont. 309, 180 P.3d 1161 (Court declined to review alleged violation of ex post facto clauses of federal and state constitutions); *City of Missoula v. Campbell*, 2001 MT 271; 307 Mont. 286; 37 P.3d 670 (Court refused to review claimed violations of the fourteenth amendment); *Day v. Payne* (1996) 280 Mont. 273; 929 P.2d 864 (Court declined to hear constitutional challenge to punitive damage award); *In re Paternity of Adam* (1995), 273 Mont. 351; 903 P.2d 207 (Court refused to hear claim of denial of equal protection); *Bailey v. Montana Department of Health & Environmental Sciences* (1983), 204 Mont. 253, 664 P.2d 325 (Court declined to address alleged due process and equal protection violations).

Johnson's alleged violations of his constitutional rights, whether derived from Emmerson's rights or otherwise, do not implicate substantial rights of life and liberty nor are they matters of broad public concern. Johnson had every opportunity before the district to assert constitutional rights as a defense to Walker's interference claims, and he did not do so.

involved significantly more than six acts. (A summary of Johnson's acts is set forth at pages 18-20 of Walker's opening brief).

Third, Johnson's contention that a tortious interference claim must be supported by conduct that is wrongful is incorrect. In support of this conclusion Johnson cites an unrelated civil conspiracy case and ignores the relevant law on tortious interference with contract. Conduct that is not wrongful or unlawful can support a tortious interference claim. *See* RESTATEMENT (SECOND) OF TORTS 767, comment c. The elements of tortious interference do not include a requirement of a wrongful act. Tortious interference can be based upon a series of acts none of which are either unlawful or wrongful, though in this case there was a wrongful act created by Johnson's inducement of Emmerson's breach of the exchange agreement. In *Nesler v. Fisher and Company* (Iowa 1990), 452 N.W.2d 191, a case relied upon by Johnson, the court held that though the act or acts of the defendants in and of themselves were not improper (*i.e.* filing or encouraging lawsuits and lodging complaints) such acts could not be done without impunity, the query for a tortious interference claim turned on the "motivation" for the acts. *Id.* at p. 198. "[W]hen the act is done with a desire to interfere with contractual relations, the motive behind the act rather than the act itself is determinative." *Nesler* at p. 198.

Finally, Johnson is incorrect in advancing an argument that if he committed a number of acts and one was protected that there can be no finding of tortious interference. That argument is ludicrous on its face and leads to a ridiculous result. Under Johnson's argument one who was exercising his

freedom of speech via a protest march in the streets, but who in the process trespassed upon and vandalized private property would be immune from claims for the trespass and property damage. In essence Johnson argues a wrongdoer is immune from claims for his wrongful acts if one of the wrongdoer's other acts is a protected or lawful act. The folly of this argument is clear on its face. The application of this absurd argument to all the facts (most of which Johnson conveniently ignores) and conclusions found by the district court in this matter is also clear.

Johnson's argument that precision in review is required lest constitutionally protected acts be punished is inapplicable under the facts of this case, inasmuch as Johnson, a stranger to the contract, had no constitutionally-protected rights. Nonetheless the district court did carefully review the facts and the law in coming to an award of emotional distress damages for Johnson's tort.

This argument is yet another run at Johnson's unfounded and untenable claims that somehow he developed a constitutionally protected right from a contract to which he was neither a party nor a beneficiary. Johnson does not and did not have any rights under the Walker/Emmerson exchange agreement. Johnson cannot create constitutionally protected rights out of a contract to which he was a stranger and that was none of his business. Moreover, Johnson's precision in review argument presupposes that he did not engage in unprivileged conduct that in and of itself was cause for imposition of tortious interference liability, a premise that is refuted by the record on appeal.

Finally the district court carefully addressed the facts by hearing numerous witnesses, reviewing dozens of exhibits, and drafting a lengthy decision complete with detailed findings and conclusions. That precision led the district court to a correct finding that Johnson had committed tortious interference of contract and that the Walkers were each entitled to \$75,000 in emotional distress damages.

II. THE FACTS FOUND AND CONCLUSIONS REACHED BY THE DISTRICT COURT JUSTIFY, AS A MATTER OF LAW, AN ASSESSMENT OF PUNITIVE DAMAGES AGAINST JOHNSON.

Johnson argues that the district court's decision to dismiss Walkers' punitive damages claim from the bench was an "easy one." (Johnson Reply Br., p. 20). The district court's actual findings and conclusions, prepared after trial and after the Judge had an opportunity to reflect on the case, tell a different story. As set forth in Walkers' opening brief (pp. 42-46) and below, the plain language of district court's findings and conclusions meet the standard of actual malice and support an award of punitive damages. The Walkers submit that the district court erred in its bench ruling, incorrectly applying the law to the facts that it ultimately found.

A. Because the facts of this case are uncontested on appeal, the appropriate standard for reviewing the district court's decision denying Walkers an award of punitive damages is whether the district court correctly interpreted and applied the law.

Johnson argues that it was within the discretion of the district court to determine whether or not punitive damages were appropriate. (Johnson Reply Br., p. 20). In doing so, however, he cites an incorrect, "abuse of discretion,"

standard of review. Johnson does not contest the facts found by the district court (Johnson Opening Br., p. 7). Thus, with respect to punitive damages, the issue before this Court is not whether the district court abused its discretion in finding facts based on the evidence it heard, but it is instead whether the district court correctly applied the law when it declared that the facts did not demonstrate the requisite “malice.”

A conclusion of law is reviewed for the correctness of the district court’s interpretation of the law without deference to the district court’s discretion. *See Steer, Inc. v. Department of Revenue* (1990), 245 Mont. 470, 474-475, 803 P.2d 601, 603. In *Steer*, this Court stated:

[I]n reviewing conclusions of law, our standard of review will be merely to determine if the agency's interpretation of the law is correct, instead of applying the inappropriate abuse of discretion standard.

...

The reasoning for simply determining if the court's conclusions are correct is that no discretion is involved when a tribunal arrives at a conclusion of law—the tribunal either correctly or incorrectly applies the law. For that reason, this Court concludes that our standard of review relating to conclusions of law, whether the conclusions are made by an agency, workers' compensation court, or trial court, is whether the tribunal's interpretation of the law is correct.

Id. (internal citations omitted). *See also, Bitterroot River Protective Association, Inc. v. Montana Department of Fish and Wildlife and Parks*, 2008 MT 377, ¶18, 346 Mont. 507, 198 P.3d, 219; *Fasbender v. Lewis & Clark Co. Board of County Commissioners*, 2009 MT 323, ¶10, 352 Mont. 505, 218 P.3d 69.

B. The district court's Conclusions of Law 15 and 16 mirror the definition of malice set out in the punitive damages statute, Mont. Code Ann. §27-1-221(2).

Mont. Code Ann., §27-1-221(2), defines actual malice for the purposes of punitive damages as follows:

- (2) A defendant is guilty of actual malice if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and:
 - (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or
 - (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

This Court has found that Mont. Code. Ann. §27-1-221(2) provides “an *objective* criterion for determining malice based upon a person’s deliberate behavior stemming from actual knowledge or intentional disregard for probable injury to another.” *Plouffe v. Montana Department of Health and Human Services*, 2002 MT 64, ¶29, 309 Mont. 184, 45 P.3d 10 (emphasis added). In *Plouffe*, this Court further instructed that:

[A] finding of actual malice, pursuant to §27-1-221, MCA, entails an independent inquiry as to the defendant's knowledge regarding the probability of injury resulting from the improper prosecution. The defendant's consciousness that the failed litigation would have a high probability of adverse consequences for the plaintiff, of course, does not require injurious intent or motive. Such awareness is equally consistent with indifference toward or disregard for consequences. Indeed, *pursuant to §27-1-221(2), MCA, actual malice can be present in a prosecution where the harmful consequences are unintentional.*

Id. (emphasis added).

The district court's own Conclusions of Law 15 and 16 clearly establish that Johnson's acts were malicious as defined by §27-1-221(2) MCA. Indeed, the district court's conclusions closely parallel the statute's language:

15. *Johnson's acts* in (a) enticing Emmerson to ignore the Walker/Emmerson exchange agreement by making offers to Emmerson for more money than the Walker exchange agreement; (b) by entering into an exchange agreement with Emmerson; (c) by funding and directing Emmerson to file the complaint against Walkers to invalidate the exchange agreement; (d) by providing legal opinions to Emmerson's lawyer on how to invalidate the Walker/Emmerson exchange agreement (Dec 12 letter to Knuchel); (e) by recommending lawyers to Emmerson to pursue a complaint against the Walkers after Emmerson's lawyer, Josephson and Woodruff maintained the agreement was valid; and (f) by ultimately making available his own lawyer to Emmerson to file this suit *were intentional and willful acts designed to invalidate the Walker Emmerson Land Exchange to the detriment of the Walkers. Johnson's actions were done without lawful purpose.* Johnson was not a party to the Walker/Emmerson exchange agreement but *deliberately* interfered with the contract. *As a result of Johnson's actions, the Walkers have been damaged.*

16. *Johnson's actions* beginning sometime in the fall of 2006 through the present *were (a) intentional*, were designed to interfere with the Emmerson/Walker exchange agreement;... (d) were designed so that the interest sought to be advanced by Johnson was to obtain property for himself with the loss to Walkers....

COL 15, 16 (emphasis added).

The district court's off-the-cuff ruling from the bench that Johnson acted without malice is incongruent with the court's more reflective Conclusions of Law 15 and 16. Proper application of the objective criteria set forth in §27-1-221(2), MCA to the facts the district court found necessitate a conclusion that

Johnson acted with the requisite malice to support an award of punitive damages. Given the district court's conclusions of law holding that Johnson's actions were intentional, wrongful, and designed to obtain property for himself to the damage and detriment of Walkers, the district court misapprehended the law in declaring Johnson did not act with malice.

C. Johnson's egregious conduct far exceeded the statutory definition of malice for purposes of punitive damages. His actions were spiteful and vindictive.

While the common law notion of "spite" is unnecessary for a finding of malice in the context of punitive damages, Johnson's acts were in fact spiteful and vindictive. He acted vindictively when he filed baseless counterclaims against Walkers for tortious interference of contract, abuse of process, and Rule 11 sanctions; claimed \$50,000 in emotional distress damages for a lawsuit he initiated; claimed \$50,000 for each trip he made to Montana by private jet for this litigation only to withdraw these groundless travel reimbursement claims during trial; threatened another lawsuit for tortious interference with contract regarding a parcel of State of Montana land Johnson sought to acquire, when in fact he had no contract and Walkers did nothing to interfere; and implied that Ace Walker's trial testimony had violated Johnson medical privacy which may subject Ace to further claims from Johnson.³

The language of Johnson's counterclaims is representative of the unwarranted but nonetheless threatening claims made against the Walkers:

³ The district court found Johnson's claims alleging violation of medical privacy to be "completely unfounded." FOF 55.

21. Walker's reliance on the Emmerson/Walker exchange agreement as the mechanism for interfering in Johnson's legitimate efforts to acquire the Emmerson property was done with notice and knowledge that the Emmerson/Walker Exchange Agreement was unfavorable as a matter of law.

...

25. Walkers and/or his counsel have, in their complaint herein, as to at least one of the counts alleged by them therein, brought such claim(s) with full knowledge that they have no basis in law and solely for the purpose of harassing and intimidating Johnson into paying them monies to avoid having to deal with this litigation.

(Johnson's Counterclaims against Walkers, CRR 26, ¶¶ 21, 25)

At the time Johnson made these claims against Walkers and their counsel, Johnson had knowledge that at least three lawyers had concluded that the Emmerson/Walker Agreement was valid. Thus this counterclaim, together with Johnson's attendant claims for emotional distress damages and air travel reimbursement, could only have been brought out of spite and to intimidate Walkers. In acknowledging Johnson's approach to the Walkers, the district court found that Johnson's attitude, threats to spend any necessary amount of money to obtain the Emmerson property, and past actions were meant to distress the Walkers. (FOF 55)

Given all the facts and the law as found by the district court in Conclusions of Law 15 and 16, this was and is a case ripe for punitive damages. It is not unusual for punitive damages to be awarded in the context of a tortious interference with contract case. This Court has affirmed awards of punitive damages in tortious interference cases to punish acts far less egregious than those committed by Johnson. *See, e.g., Maloney v. Home and Investment Center*, 2002 MT 34, 298 Mont. 213, 994 P.3d 1124 (awarding

\$76,149 in punitive damages to a potential purchaser who did not have a contract, but only a prospective contract); *Daniels v. Dean* (1992), 253 Mont. 465, 833 P.2d 1078 (District court found punitive damages in the amount of \$25,000 for the interference with a lease); *Moore v. Hardy* (1988), 230 Mont. 158 748 P.2d 477 (finding punitive damages for a breach of duty in failing to assign a lease).

In sum, the district court's snap decision from the bench to dismiss Walkers' punitive damage claim because it found no "malice" was an incorrect interpretation of the law. The district court's conclusions of law reveal that Johnson acted with malice as defined by §27-1-221(2), MCA, and for that reason this case should be remanded to the district court for a hearing on punitive damages.


CONCLUSION

For the reasons set forth herein and in Walkers' opening brief, Walkers respectfully request that this Court;

1. Affirm the district court's order awarding \$75,000 in emotional distress damages to both Rana Rae and Wallace Walker;
2. Affirm the district court's order awarding attorney fees and costs as set forth in the court's judgment dated July 13, 2009;
3. Award Walkers their attorney fees and costs incurred for this appeal and direct the district court to hold further proceedings to ascertain the amount of said fees and costs; and
4. Remand to the district court for a determination of an award of punitive damages against Johnson and in favor of Walkers.

RESPECTFULLY SUBMITTED: April 29, 2010

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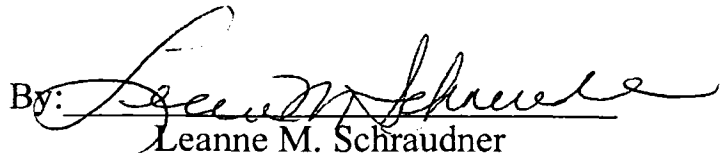
CERTIFICATE OF COMPLIANCE

In accordance with the requirements of Rule 11, M.R.App.P., the undersigned certifies the following:

1. All portions of the brief not specifically excluded under Rule 11 are printed with a proportionately spaced typeface of 14 points.
2. The font used is "Times New Roman." The text of the brief is in a roman, non-script text, except for case names and signals.
3. The text of the brief is double-spaced. Footnotes and quoted material are single-spaced.
4. The left-side margin is 1.25 inches; the top, bottom, and right-side margins are 1.0 inch.
5. The word count calculated by Microsoft Word 2004 (Macintosh) is less than 5,000 words, omitting those portions of the brief specifically excluded under Rule 11.

DATED: April 29, 2010.

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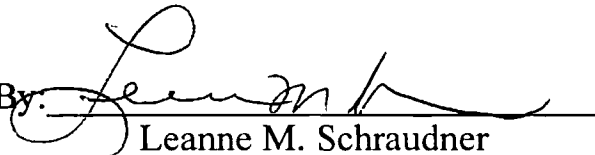
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 29, 2010, a true and correct copy of the foregoing Appellee's Brief was duly served on the following by depositing the same in the U.S. mail, postage prepaid, addressed as indicated:

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